

Not a Police State just yet

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To all the many who have supported us with small, medium and sometimes even larger donations and continue to do so, my sincerest gratitude! That is awesome, and so you can see that we put the money to good use, we have started a daily 20-minute crisis podcast under the title "Corona Constitutional". It's [here \(RSS feed\)](#) and on all common platforms. We continue to work under high stress, though, and warmly welcome your support on [Steady](#) and/or one-time donations (paypal@verfassungsblog, IBAN DE41 1001 0010 0923 7441 03)!

When a natural disaster strikes, you drop everything. What was important and urgent a moment ago appears suddenly irrelevant, all your energy goes into fighting off the threats of the moment, all else has to wait. This is also the case with the Corona crisis, and until recently it seemed that this also applied to the topic that was so dominant on Verfassungsblog in recent years: the advance of the authoritarian populist right.

But that is not true. On the contrary. How well we get through the crisis depends largely on how much, or better: how little influence we allow the authoritarian populist right to have in the process.

On various right-wing Internet sites, the Freiburg constitutional law professor emeritus Dietrich Murswiek – some may remember his name from the days of the Euro crisis when he was Peter Gauweiler's attorney in Karlsruhe – makes a dashing appearance as constitutional doom-monger-in-chief these days. Murswiek enjoys some notoriety, for his wildly reactionary views in general, for his youthful adventures as an ultra-patriotic activist in the early 70s, and for his ethnic understanding of the German *Staatsvolk* as the holder of the sovereignty of the people, but – for reasons not entirely comprehensible to me – he still is a man held in high esteem by many in academic constitutional law. What he has to say about the Corona crisis, however, could easily be confounded with a liberal position against authoritarian executive self-empowerment in a state of emergency: According to Murswiek, the measures taken by the federal and state governments in Germany against the pandemic plunge the country in an *extra legem* state of emergency where all sort of fundamental rights are suspended for an indefinite period of time. These measures, he claims, are entirely disproportionate, which is why the shutdown of public life must end immediately by constitutional law.

This fits in neatly with the narrative the authoritarian populist right keeps telling since 2013, a narrative which German *Staatsrechtslehrer* helped to engender all the way: The government's crisis management, according to this narrative, is both tyrannical and a "political failure" (*Politikversagen*) because it imposes burdens on ordinary German citizens just to save some foreigners from some unpleasant fate. *Danke, Merkel!*

The scandal, from this point of view, is not so much the fact that the government might be tempted to extend its powers beyond what the constitution allows. No, it is primarily about what they claim as their *right*, which is basically their wish to remain undisturbed by the imposition of solidarity with more vulnerable people, to enjoy their health and their wealth and to go to the opera unhindered as a matter of personal liberty. Isn't that what one has studied *Staatsrecht* for after all, to turn oneself into an expert in transforming wishes like these into strict commandments of constitutional law in every situation in life? Oh, it's always the same boring old constitutional mimicry, isn't it? I bet good old Ulrich Vosgerau is already sitting somewhere, diligently proclaiming the "*Herrschaft des Unrechts*" all over again.

Make no mistake: I'm not saying everything is fine. Of course not. It *is* a crisis we are facing, a crisis that comes with unprecedented encroachments on fundamental rights and shakes the constitutional setup of the Federal Republic of Germany to the core. But crisis doesn't equal catastrophe. A crisis is when the patient either dies or starts to recover. We don't know yet for sure which it will be, but at least for now, and at least for Germany, the path of recovery appears altogether rather more likely to me than the imminent exitus.

Certainly, Health Secretary Jens Spahn's excessive self-empowerment to the detriment of parliament and the federal states last week has been allowed to become the law of the land. But at least there is still a critical public that notices and disapproves and appears, even in these times of hardship, rather unprepared to fall into authoritarian lockstep. Certainly, the lockdown breeds all sorts of snoops and informers, and the security forces tends to indulge in their common lust for forbidding things even more corybanticly than in ordinary times. But a police patrol which chases solitary ladies off their sunbathing towels in some remote corner of a park still has to expect to be politely asked to give justifiable reasons for doing so, I guess. And I still can't see any reason to doubt that, if necessary, the administrative courts will grant due protection when called upon. The authoritarian temptation is palpable everywhere, for sure – but so is the liberal counterforce.

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Stellenausschreibung

Am Lehrstuhl von **Prof. Dr. Silja Vöneky**, sind derzeit **mehrere spannende Stellen für Wissenschaftliche Mitarbeiter (m/w/d)** zu besetzen.

Für das Drittmittelprojekt „**Data Access and Data Use in Medical Institutional and Consumer Health Settings**“ werden Mitarbeiter*innen gesucht, die Interesse und Freude an den rechtlichen Fragen rund um die Forschung mit gesundheitsbezogenen Daten haben.

Diese 25-100%-Stellen, sowie eine 37%-Stelle am Lehrstuhl, sind mit der Gelegenheit zur Promotion verbunden.

There is, especially in times of crisis, ample reason to be suspicious of the executive which is only too happy to take the opportunity to pluck all sorts of chickens whose feathers it was keen on long before the current crisis (I'm looking at you, Federal Police Chief Romann). I am not alarmed at all, however, by the fact that libertarian machos who put their undisturbed enjoyment of liberty above everything else are facing trouble with the police in times like these. After all, containing those urges is what the police is there for, isn't it? All the more remarkable seems to me that so many people, possibly even the vast majority, is simply trying to do the right thing, staying at home, strapping on those self-made face masks, washing their hands and whatever else Doctor Drosten recommends, not because they're under duress, not because of brute police force, but because this is what they, being mature, responsible adults, conceive as a necessary imperative of solidarity. That's not what a police state looks like. It's the opposite.



(Hopefully all this will still be true when the pandemic reaches its full force...)

Hungary, Poland, Russia, France, Turkey

There is really no lack of illustrative material in Europe right now about what it looks like when authoritarianism seizes control of a country on the occasion of a crisis. **Hungary** is certainly an example of this, but perhaps not just that. It is true that Viktor Orbán's emergency law, as KIM LANE SCHEPPELE puts it, takes Hungary "to the edge of dictatorship" with its draconian punishments for "fake news" and military personnel taking control in factories and clinics – empowerments that may remain in force as long as Orbán finds them useful, even after the crisis is long over. But that, Scheppele says, is perhaps more a sign of weakness than of strength:

Hungary is more vulnerable than most countries in the developed world because its health care system was in a state of near collapse even before this virus appeared on Hungary's doorstep. The underfunded and understaffed hospital system may well fall into dysfunctional chaos with even a mild outbreak of this virus in the country. And that would be a real emergency. The threat of coronavirus in Hungary is serious and Orbán no doubt knows that the country is not ready to handle it.

What is remarkable about Orbán's Enabling Act is not least that it reveals what has up until now been cloaked by a semblance, however transparent, of democratic rule of law: that Orbán and his FIDESZ two-thirds majority can by and large do whatever they want, and because they want to, without any meaningful parliamentary and judicial control. That semblance is now gone for good, the autocratic nature of the Orbán regime is exposed and laid bare for everyone to see. (Do you disagree, Ursula von der Leyen?)

In **Poland** the PiS government would very much like to have the sort of all-encompassing power which FIDESZ already possesses. The decisive factor is that it wins the presidential elections in May, and on the way to achieving this the Corona crisis appeared like a godsend. KATARZYNA NOVICKA describes the unconstitutional means the PiS is taking to use that opportunity. On Thursday, it looked for a while as if its position might be less robust after all than one would have thought, too, with Minister of Education Jarosław Gowin suddenly signaling his discontent with the plan and questioning his party's coalition with PiS. But that hope evaporated quickly. Instead, Gowin proposed to extend the incumbent President Andrzej Duda's term of office for two further years. (Don't ask.)

TÍMEA DRINOCZI and AGNIESZKA BIEN-KACAŁA provide a comparative analysis of Hungarian and Polish emergency legislation.

In **Russia**, President Putin announced and carried out his "constitutional reform" before the Corona crisis reached the shores of his realm, but whether and how his amendments can come into force is in the stars: a referendum will be necessary, and that's not going to happen anytime soon now. CAROLINE VON GALL and LAURA JÄCKEL disentangle the different strands of the narrative.

In **France**, according to CATHERINE HAGUENAU-MOIZARD, the current *état d'urgence sanitaire* reveals all sorts of pre-existing shortcomings in the constitution: The power of the president is not matched by the adequate power of the parliament to control him politically. "It seems that over the years, and especially since 2015, French governments are getting used to governing through fear."

There is no place where man is more vulnerable, both in terms of human rights and Corona contagion, than prison. EMRE TURKUT and ALI YILDIZ recall the obligations arising from the ECHR with regard to prisoners, and report on plans by the **Turkish** government to release a third of the inmates to keep the contagion risk under control – political prisoners not included, of course.

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Reporting International, funded by Stiftung Mercator.

And where is the **EU** in all this? Oh well, where indeed? In our brand-new "Corona Constitutional" podcast, I spoke to [PAULINE ENDRES DE OLIVEIRA](#) about the infection hotspots on the Greek islands and the ECJ ruling on the relocation of refugees, and to [WALTER MICHL](#) about the options to check the rampant authoritarian clampdown in EU member state Hungary, including the often overlooked possibility for member states to take Hungary to court for its treaty infringements – actually the job of the Commission if only President Ursula von der Leyen would finally start doing hers at last, instead of speaking feeble words of worry and preoccupation into TV cameras without even daring mention Hungary by name.

In [ANNA KATHARINA MANGOLD's](#) view, the Corona crisis can be seen as the culmination of all previous crises of the EU – the euro and financial crisis, the refugee protection crisis, the rule of law crisis – in a way that threatens the very existence of the EU. For the crisis to be followed by catharsis, the EU must reform itself, finally give Parliament the right of legislative initiative as promised, and make political and social integration its mainstays. On our "Corona Constitutional" podcast Katharina and I have looked further into this.

The hour of politics

And in Germany? Murswiek and his ilk claim the country is in a "state of emergency", in the accusatory sense. On Verfassungsblog, however, the diagnosis has been mostly different.

This is the "hour of politics", writes [SOPHIE SCHÖNBERGER](#): The Corona pandemic reveals the problem of a no-alternatives policy in the absence of reliable scientific findings. This means for a democratic society to learn again to live with the uncertainties and insecurities of democratic decisions. [MICHAEL MEYER-RESENDE](#) disagrees with Home Secretary Horst Seehofer's no-alternative rhetoric, as well, and calls for political dispute to be allowed even and especially in times of crisis. The purpose of the measures to combat the pandemic may be undisputed, [JONAS HELLER](#) emphasizes – the measures themselves are not. Especially since the crisis, far from being the "hour of the executive" alone, entails more than ever controversial decisions about social justice and international solidarity, as [ANUSCHEH FARAHAT](#) notes.

For [JASPER FINKE](#), the state-of-emergency rhetoric is little more than a sorry excuse for lawyers too full of themselves to perceive a crisis for what it is: "The construction of a fundamental difference between normality and exception is the basis for not having to deal with what happens in a state of emergency from a legal perspective. The supposed crisis phenomena are externalized and allow the maintenance of an idealized understanding of law that claims to shape the actual conditions instead of being shaped by them."

LENNART KOKOTT wonders whether the "lack of images in politics" in times of home office and abandoned parliaments could turn into a problem of democracy theory, albeit with a conciliatory conclusion. MATTHIAS FRIEHE, in turn, warns his fellow constitutional lawyers against relying too much on their power of judgement. The fight against the pandemic is taking place under conditions of extreme uncertainty, which makes it correspondingly difficult to judge its proportionality. And JULIAN KRÜPER is generally fed up with alarmist law professors and their "academically sublimated disaster tourism" and, unafraid of performative self-contradiction, plainly asks them to shut up: "Too much writing is going on anyway."

Krüper's text is nicely written and a jolly read, and it definitively would have been a shame if he had kept his mouth shut. This is even more true for those who do what public lawyers do best, i.e. measure state action by the standard of law. And indeed, among the measures of the executive, there is quite a lot that happens to not really stand up to critical legal review. In Berlin, for example, we're now obliged to always carry an ID with us at all times. What exact purpose is this duty supposed to achieve as a proportionate measure? JAN FÄHRMANN, CLEMENS ARZT and HARTMUT ADEN find no adequate answer to this question.

Human Dignity

What if, as in Italy and Spain, people start dying en masse in Germany? If patients claim ventilators in greater numbers than they're available? LINO MUNARETTO attempts to distinguish the normal case of state obligations to protect from the exceptional case when fulfilling that obligation is impossible, and proposes that the state be granted a "reservation of the possible" in situations like a pandemic. MATHIAS HONG, on the other hand, refers to the human dignity core of the right to life, which must never be offset against other legal positions: "The decisive factor for the protection of human dignity is that it must not be based on an expected 'remaining life span', but only on the probability of survival and chances of recovery of the concrete patient." HANNO KUBE also stresses that "the desire for free and equal development of the personality in dignity is very clearly and with a strong emphasis on fundamental rights contrasted with the dignity of life of the elderly and weak who are particularly at risk".

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NIKOLAUS MARSCH and I discuss in our "Corona Constitutional" podcast whether the existence of tracking apps and other technological fixes could change the proportionality calculation. And indeed, unlike others, Marsch even considers an compulsory tracking app to be constitutionally conceivable eventually.

How well does the Basic Law withstand the stress test of the corona crisis? PIERRE THIELBÖRGER and BENEDIKT BEHLERT recently (it feels like months ago) asked this question here, and the problems they diagnosed have not much diminished since then.

Among the fundamental rights less often discussed in the context of this crisis is the freedom of scientific research. On the one hand, it is particularly in demand when it comes to vaccines, but on the other hand it is restricted by dual-use regulations for virological research. This can turn into a headache, warns BARBARA GERMANN.

In non-Corona-related news, there are, unsurprisingly, still some very noteworthy things going on: This applies not least to the **British** government's plans to derogate from the European Convention on Human Rights when it comes to overseas operations of its armed forces. ALEXANDRA FOWLER examines what this is all about.

That's all for this week. Now, more than ever, stay safe and healthy and check out our new podcast!

Max Steinbeis



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All the best, *Max Steinbeis*

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